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IN THE SUPREME COURT
OF THE
UNITED STATES

October Term, 1996

In Re: HASSAN HAMIDI HASHEMI

Debtor

AMERICAN EXPRESS TRAVEL RELATED
SERVICES COMPANY, INC

Plaintiff-Respondent

v

HASSAN HAMIDI HASHEMI

Defendant-Petitioner

Petition for Writ Of Certiorari
To The United States Court of Appeals
For The Ninth Circuit

Petition For Certiorari

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Questions Presented

1) Whether The Seventh Amendment applies to a suit involving common law fraud allegations brought in the Bankruptcy Court against a debtor.

2) Whether the Bankruptcy Court committed reversable error by presuming fraud or finding fraud implied by law as opposed to requiring proof of all of the elements of actual fraud by a preponderance of the evidence in a case brought to determine the dischargeability of a debt.

3) Whether an honest but unfortunate debtor in bankruptcy who prevails in an action based on a credit card agreement is entitled to an award of attorney's fees in accordance with California law which entitles the prevailing party on a contract dispute to attorney's fees.

4) Whether a defendant is denied Fifth Amendment due process of law: 1) when the court considers a matter at common law such as common law fraud to be a matter of equity; and 2) when fraud is presumed by the court in the absence of factual evidence of actual fraud before the court.

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For The Ninth Circuit

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Opinions Below

The ORDER DENYING JURY TRIAL, the JUDGMENT IN FAVOR OF AMERICAN EXPRESS FOR $69,793.67 DECLARED TO BE NONDISCHARGEABLE IN BANKRUPTCY, and the FINDINGS OF FACT AND CONCLUSIONS OF LAW DECLARING DEBT FOR $69,793.67 TO BE NONDISCHARGEABLE of the United States Bankruptcy Court For The Central District Of California are not reported. The Order of the United States District Court For The Central District Of California affirming the decision of the Bankruptcy Court is not reported. The OPINION of the United States Court Of Appeals For The Ninth Circuit is reported at page 16455 slip opinion of the 9th Circuit case No 95-55628, filed December 30, 1996. The ORDER AND AMENDED OPINION of the United States Court Of Appeals For The Ninth Circuit is reported at page 693 slip opinion of the 9th Circuit, case No 95-55628, filed January 24, 1997.

Jurisdiction

The OPINION of The United States Court Of Appeals For The Ninth Circuit was filed on December 30, 1996. The ORDER AND AMENDED OPINION was filed on January 24, 1997. Jurisdiction of this court is invoked pursuant to 28 U.S.C. § 1254.

Constitutional And Statutory Provisions Involved

The Fifth Amendment to the United States Constitution is reprinted in the appendix at page 56. The Seventh Amendment to the United States Constitution is reprinted in the appendix at page 56. 11 U.S.C. § 523(a)(2)(A) is reprinted in the appendix at page 57.

Procedural Background

On October 20, 1993 plaintiff American

Express Travel Related Services Company, Inc filed a complaint to determine dischargeability of a debt in the Chapter 7 bankruptcy case of defendant Hassan Hamidi Hashemi in the United States Bankruptcy Court which petition was filed on July 22, 1993. An answer to the complaint was filed by defendant Hashemi November 22, 1993 wherein a request for trial by jury was duly made. Defendant Hashemi filed a motion for summary judgment on March 11, 1994 which was denied by the court April 21, 1994. The case was set for trial which was held by a visiting judge from another district on or about September 16, 1994. Judgment was entered in favor of American Express on September 22, 1994. Also a separate order denying the jury trial requested by defendant Hashemi was entered on September 22, 1994. A first amended Notice Of Appeal to the District Court was timely filed on or about October 19, 1994. A Designation Of Record On Appeal And Statement Of Issues was filed by defendant Hashemi on or about October 07, 1994. A Request That This Appeal Be Referred To The United States District Court was filed in the United States Bankruptcy Appellate Panel For The Ninth Circuit on October 21, 1994. After hearing the District Court entered an order affirming the judgment of the Bankruptcy Court and Order Denying Jury Trial on March 27, 1995. A Notice Of Appeal To The Court Of Appeals was timely filed April 19, 1995. After hearing on September 20, 1996, the Court Of Appeals For The Ninth Circuit affirmed the judgment of the Bankruptcy Court. The opinion was filed December 30, 1996. The Court Of Appeals For The Ninth Circuit subsequently filed an Order And Amended Opinion on January 24, 1997.

At the bankruptcy trial court and in every subsequent court of appeal defendant Hashemi raised the issue of his Seventh Amendment right to a jury trial on the issue of common law fraud allegations. At the same time he also argued that there is no evidence before any court of

any actual fraud on his part. The Fifth Amendment issue of denial of due process by presuming fraud on his part is being raised in this court for the first time. Thus, the court may or may not wish to deal with the Fifth Amendment issue but may do so pursuant to the rules of practice of this court as expressed in the case *Youakim v Miller* 425 U.S. 231, 96 S.Ct. 1399, 47 L.Ed.2d 701 (1976).

Original Jurisdiction

The Bankruptcy Court is vested with jurisdiction of this matter which is a core proceeding pursuant to 28 U.S.C. § 157(a), 28 U.S.C. 157 (b)(2)(I), 28 U.S.C. § 1334(b), and 11 U.S.C. 523(c).

Factual Background

Prior to the filing of his petition in Bankruptcy defendant Hashemi entered into several credit card agreements with plaintiff American Express wherein American Express essentially extended unlimited and unrestricted credit to defendant Hashemi. Pursuant to the credit card agreements defendant Hashemi is entitled to incur charges using the credit cards then pursuant to the agreement he is obliged to pay the credit card balances each month as billed.

Defendant Hashemi is employed as a professor of Electrical Engineering at California State University. Additionally in 1992 he and a partner built a condominium project in Los Angeles with the expectation of selling the condominium units at a net profit to himself and his partner of upwards of one million dollars profit before taxes. However, at or near the time that the units of the condominium were offered for sale on the open market property values in the area dropped drastically which wiped out the equity that

defendant Hashemi and his partner had in the project and caused him to become insolvent because of loss of the ability to pay his debts due to the drastic decline of real property values in Southern California.

The charges incurred pursuant to the credit card agreements with American Express were all made in a period of a few weeks on a trip by defendant Hashemi and his family to France to visit with his mother in law for purposes of obtaining a loan which he needed to make payments on a secondary trust deed note on the condominium project. During this trip which defendant Hashemi regarded as a business trip he ran up charges on his American Express charge cards of over $65,000. Unfortunately for defendant Hashemi he was unable to negotiate the needed loan from his mother in law in France and when he returned to Southern California the condominium units were in foreclosure and he was unable to clear up the default on the real estate loans. Additionally not one single unit of the condominiums were successfully sold on the depressed real estate market at the time. If one single unit of the condominium project had been sold defendant Hashemi would have been able to pay his debt to American Express, but this is not the case and defendant Hashemi was accordingly unable to pay his debts to American Express for the trip to France. Using hindsight this trip was a mistake, but defendant Hashemi did not have a crystal ball or know that the trip would not be productive financially for him in advance of the trip to France.

The agreement with American Express to use the credit cards did not restrict defendant Hashemi to not purchase luxury items, did not restrict him to not make multiple charges on the same day, did not restrict him in any way whatsoever in the use of his credit cards except that he agreed to pay the balance as billed each month in full. The agreement also provided that

the prevailing party on the credit card agreement in any lawsuit would be entitled to an award of attorney's fees as an element of costs pursuant to California law.

About a year after defendant Hashemi returned from France to Southern California one of his creditors attempted to levy on his salary at the University Of California which forced him to file a Chapter 7 petition in bankruptcy for liquidation of his assets and discharge of his debts. After filing his petition in bankruptcy defendant Hashemi was sued by American Express claiming his debts are not dischargeable on grounds of common law fraud.

During discovery in the suit a representative of American Express admitted that the only evidence that American Express had of any fraud on the part of defendant Hashemi is that he did not pay his debts as agreed and thereby breached his contract with American Express. Accordingly a motion for summary judgment on the fraud claim was filed by defendant Hashemi but denied on the grounds that his intent could be presumed by the trial court and that a credit card creditor need not prove all of the elements of actual fraud in bankruptcy court to obtain a judgment of non-dischargeability.

During the trial American Express offered no admissible evidence of the elements of actual fraud but instead focused the attention of the court on so called Dougherty factors which have been held to permit the court to infer fraudulent intent and as a practical matter fraud itself. These factors include whether the debtor made multiple charges on the same day, whether the debtor consulted with an attorney prior to making the charges, whether the debtor purchased a luxury item, and the like. While the credit card agreement with American Express did not restrict defendant Hashemi from doing

any of these things, since he did not pay his bills as agreed American Express claimed in the bankruptcy court that these things should be conclusive evidence of fraud on the part of defendant Hashemi.

During the trial the bankruptcy trial court principally relied on the case *In Re: Dougherty* 84 B.R. 653 (Bankr. 9th Cir. 1988). In this case the court held that pursuant to § 523(a)(A)(2) of the Bankruptcy Code a creditor is required to prove all of the elements of actual fraud to obtain a declaration of nondischargeability of a debt except for credit card creditors who cannot prove reliance and representations, so these elements of fraud can be presumed by the court as opposed to being actually proven with admissible evidence. Also the court held that there are several non exclusive factors for the court to consider when determining whether a debtor committed fraud in a credit card case such as whether a debtor purchased a luxury item with the credit card and the like. Apparently the court decided that it is simply not equitable to permit a debtor to discharge a credit card debt used to purchase a luxury item and the like.

During the trial defendant Hashemi presented several expert witnesses who presented uncontroverted evidence that he reasonably expected to earn a profit before taxes along with his partner of upwards of $1,000,000 in the condominium project, but when the real estate values in the area of the project crashed at or near the time that the condominium units were offered for sale, defendant Hashemi unfortunately simply lost his ability to pay his debts to American Express and other creditors as well. Defendant Hashemi proved with admissible evidence that but for the drastic decline in property values in the area he could have and would have paid all of his debts to American Express and his other creditors as well.

However, at the trial the bankruptcy trial court focused on the so called Dougherty factors which the court perceived to be the true equitable factors involved in the case and found that defendant Hashemi had indulged in several of these factors such as making a unsuccessful trip to France to raise money for his condominium project, making multiple purchases on the same day, purchasing, in the view of the court, luxury items, and the like. In spite of the fact that defendant Hashemi proved that he merely was offered and accepted the line of credit from American Express and used it pursuant to the credit card agreement the trial court focused on the Dougherty factors and declared that the debts to American Express are not dischargeable on grounds of actual fraud as presumed by the court.

The court also denied defendant Hashemi a trial by jury on the grounds that a suit for nondischargeablity of a debt due to actual common law fraud is equitable in nature because of the declaration that the fraudulently incurred debt is declared to be nondischargeable.

Defendant Hashemi filed an appeal to the Federal District Court which affirmed the judgment of the Bankruptcy Court, then on Appeal to the United States Court Of Appeals For The Ninth Circuit the judgment of the bankruptcy court was again affirmed.

There is a line of cases in the Supreme Court that support the position of defendant Hashemi that he is entitled to a trial by jury on the issue of allegations of actual common law fraud, but the Supreme Court has not yet ruled one way or the other to date as to whether a debtor in bankruptcy is entitled to a Seventh Amendment trial by jury on the issue of allegations of common law fraud. The cases in the circuits are conflicting on this issue as

are the cases in the several bankruptcy courts nationwide. Only this court can resolve this issue once an for all and resolve these numerous conflicts in the authorities.

On the issue of proof of actual fraud by a preponderance of the evidence for a declaration by the court that a debt in bankruptcy is not dischargeable the position of Congress on this issue is clear and consistent. The position on the issue by the Supreme Court is also clear and consistent and Congress has codified the position of the Supreme Court into the applicable section of the Bankruptcy Code, requiring actual proof by a preponderance of the evidence of fraud for nondischargeability purposes in bankruptcy as opposed to fraud implied by law or presumed fraud in the absence of any actual evidence of fraud.

The cases in the federal circuits are conflicting on this subject as are the cases in the bankruptcy system and only this court can resolve these numerous conflicting cases.

Summary Of The Argument

This court and Congress have expressed principles of law that are simply not followed in whole or in part by dozens and dozens of cases in the bankruptcy court system and in the various circuits on the issue of proof of the elements of common law fraud for purposes of non dischargeability in bankruptcy. Only this court can resolve these conflicting authorities.

This court has yet to rule on the issue of whether a debtor in bankruptcy is entitled to a trial by jury on the issue of allegations of common law fraud for purposes of non dischargeability of a debt in bankruptcy.

Whether a person is deprived of the right to due process of law when the court presumes

fraud without factual proof of actual fraud is another question only this court can resolve.

Importance Of This Case

When constitutional rights are issues this is in and of itself to make a case such as this case one of importance.

Additionally bankruptcy cases are now being filed at the rate of upwards of 1,000,000 per year. Congress and this court have repeatedly found that debtors who lose their ability to repay debts due to circumstances beyond the control of the debtor such as economic downturns should be able to discharge their debts in bankruptcy and go onwards in life with a fresh financial start. This tends to prevent debtors and their families from becoming completely destitute and without the ability to earn a decent living for themselves and their dependents. It also permits high risk takers such as real estate developers and contractors who are very vulnerable to a severe downturn in the economy to get a fresh start if economic conditions force these persons into insolvency. This again is in the national interest because these high risk takers employ millions of persons in good economic times, pay billions of dollars in taxes annually, and do much to cause real property values to consistently rise again creating a multi trillion dollar tax base for local government entities.

To saddle these debtors with such burdensome and oppressive debts that they are effectively cast into a debtor's prison without walls by declaring their debts in whole or in part to be non dischargeable based on findings of presumed but not actual fraud is not only harsh and oppressive treatment for the honest but unfortunate debtor who is the victim of a drastic economic downturn or the like but is very much not in the national interest of the

United States.

Thus this case is of importance because of the constitutional issues involved but because this case could have the greatest impact on the national economy of any case before this court during the present term of the court.

The Bankruptcy Court System

Bankruptcy is a deceptively simple but almost endlessly complex system of the law. The bankruptcy courts are very similar to the federal district court in that both of these courts are governed by the Federal Rules Of Civil Procedure. Bankruptcy courts deal with an estate of the debtor and mostly deal with issues of equity, not of law. When a debtor files a petition in bankruptcy this creates an estate administered by the court. Claims can be filed on the assets, if any, of the estate by creditors. Also creditors can file a so called adversary proceeding which is a suit in equity or at law in the bankruptcy court naming the debtor as the defendant in the suit. When a creditor files a claim in the estate this invokes the equity jurisdiction of the court. However, when the creditor files a suit known as an adversary proceeding against the debtor this may invoke the equitable or the legal jurisdiction of the court or may involve partly equitable concerns and partly legal concerns. The creditor may invoke the equitable jurisdiction of the court by filing a claim against the estate, or may invoke the purely legal jurisdiction of the court by filing a suit against the debtor such suit being called an adversary proceeding.

Thus the bankruptcy court is governed by the same rules of procedure as the federal district court, but the district courts mostly resolve controversies at law and the bankruptcy courts mostly resolve controversies founded in

equity.

In state courts the bankruptcy court can be compared to probate court in that both courts deal with estates and mostly resolve equitable claims. However, in probate court when a claimant raises common law issues such as allegations of common law fraud in a so called will contest case the common law fraud allegations are tried before a jury if so desired by any party.

The Jury Trial Issue

The Seventh Amendment confers on a party the right to trial by a jury of his or her peers in any case at common law wherein the value in controversy exceeds twenty dollars.

DECISIONS OF THIS COURT

In the case *Granfinanciera, S.A. v Nordberg* 492 U.S. 33, 109 S.Ct. 2782, 107 L.Ed.2d 26 (1989) this court held: 1) Congress does not have the power to deprive a person of his or her Seventh Amendment right to a trial by jury; 2) The bankruptcy court has the authority to conduct jury trials; and 3) When the nature of the relief in a suit is recovery of a definite amount of money then the action is legal rather than equitable in nature and this makes a prima facie case for trial of the case by jury. Clearly the present matter involving allegations of common law fraud and based on claims for damages of a definite ascertained amount is a case that falls squarely within the ambit of the Seventh Amendment. Further it is plaintiff American Express and not defendant Hashemi that invoked the jurisdiction of the bankruptcy court to decide the fraud issue by filing the adversary proceeding against defendant Hashemi. It is a fallacy that a creditor must proceed against a debtor on only equitable concerns in bankruptcy court since an adversary proceeding

can clearly raise legal concerns. On the other hand when the creditor seeks a judgment based on presumed fraud as opposed to actual or factual fraud it is the creditor who will resist any trial by jury of the matter in controversy. It would be a rare jury that would presume fraud on the part of anyone when there is no factual evidence to support such a presumption.

In the case *Beacon Theaters v Westover* 359 U.S. 500, 79 S.Ct. 948, 3 L.Ed.2d 988 (1959) this court held that the right to trial by jury is a fundamental right in our justice system and any deprivation of the right to a trial by jury is scrutinized by the Supreme Court with the utmost care. Also in this case the court held that in a case involving issues of law and issues of equity the litigants may have a trial by jury on the legal issues. This is the practice in probate courts when a claimant seeks a declaration that a will is invalid based on allegations of common law fraud which clearly is a matter with both legal and equitable concerns. However, in the bankruptcy court system when a debtor is sued by a creditor who alleges common law fraud and who seeks a declaration that the debts sued on are not dischargeable, the debtor is not given any Seventh Amendment right to a trial by jury.

At this time this court has yet to resolve the issue of a debtor's right to a jury trial in a case seeking non dischargeability of a debt based on allegations of common law fraud by the creditor, but it would be consistent with all other cases decided by this court for the court to now decide that the debtor is indeed entitled to this right. Clearly a debtor is not stripped of his or her constitutional rights by the filing of a petition in bankruptcy or by the filing of an involuntary petition by some creditor since this would mean that the Constitution is not the supreme law of this land.

TRIAL COURT AUTHORITIES IN CONFLICT WITH THE DECISIONS OF THIS COURT

On September 22, 1994, the bankruptcy court entered an order denying the defendant a trial by jury based on the authority of *In Re: Hooper* 112 B.R. 1009 (9th Cir. B.A.P. 1990) and *In Re: Hallahan* 936 F.2d 1496 (7th Cir. 1991)

In the case *In Re: Hallahan*, supra the court held as follows:

> A bankruptcy discharge and questions concerning the dischargeability of certain debts, involve issues with an equitable history and for which here was no entitlement to a jury trial in the courts of England prior to the merger of law and equity. (Citations) The relief sought is also equitable since the essence of a dischargeability claim is a declaration that the debt is indeed dischargeable or non-dischargeable. (Citation) .....
>
> A defendant or potential defendant to an action at law cannot initiate bankruptcy proceedings, thus forcing creditors to come to bankruptcy court to collect their claims, and simultaneously complain that the bankruptcy forum denies him or her a jury trial.

In the case *In Re: Hooper* 112 B.R. 1009 (9th Cir. B.A.P. 1990) the Ninth Circuit Appellate Panel following similar reasoning holds that in a nondischargeability case such as the present case, the nature of such a case is equitable, not legal, and the debtor is not entitled to a jury trial on the issues.

This case authority appears to clearly be in direct conflict with that espoused by the United States Supreme Court in the case *Granfinanciera v Nordberg* 492 U.S. 33, 107

L.Ed.2d 26, 109 S.Ct. 2782 (1989) in which case the court held:

> The Seventh Amendment entitles a party to a jury trial in bankruptcy court notwithstanding the designation of the action as a "core proceeding".....
>
> An action at law is conclusively presumed to be one when it is an action for recovery of monetary payments of ascertained and definite amounts.....
>
> Congress cannot divest parties' of Seventh Amendment right merely by relabeling preexisting common-law cause of action to which that right attaches and assigning it to specialized court of equity.

This case, however, it seems can be used to authority to the contrary. Authority that a debtor sued for fraud for a definite amount of money in bankruptcy court does not have the constitutional right to a trial by jury.

Additionally in the case *In Re: Jensen* 946 F.2d 369 (5th Cir. 1991) the court held that debtors in bankruptcy are entitled to jury trials in cases at law even though the case may have some equitable concerns and simply filing a bankruptcy petition does not strip a debtor of his or her Seventh Amendment right to a jury trial. All of this in direct opposition to the case *In Re: Hallahan*, supra and the other case cited by the bankruptcy court in this matter *In Re: Hooper*, supra.

The law of the Ninth Circuit Court Of Appeals is clearly set forth in the case *American Universal v Pugh* 821 F.2d 1352 (9th Cir. 1987) as follows:

> The recent trend has been to abandon this

> summary/plenary distinction in favor of deciding whether a litigant is entitled to a jury trial based on the nature of the cause of action (i.e., is the cause of action one of law or equity?) (Citations) We find the trend toward the law/equity test persuasive and hereby adopt that test.

Using the United States Supreme Court test for whether an action is one of law as stated in the case *Granfinanciera*, supra, it is clear that an action alleging fraud and recovery of specific monetary damages such as the present matter is one of law and the defendant Dr Hashemi should have been given a jury trial in this matter pursuant to the law as promulgated by the United States Supreme Court and the Ninth Circuit Court Of Appeals, decisions of other circuits and of the Bankruptcy Appellate Panel For The Ninth Circuit to the contrary on the principle of Stare Decis. *In Re: Rheuban* 128 B.R. 551 (Bkcy. C.D.Cal. 1991)

AUTHORITIES USED BY THE NINTH CIRCUIT COURT OF APPEALS

In its ORDER AND AMENDED OPINION filed January 24, 1997, the court of appeals approved of these same cases used by the bankruptcy trial court in affirming the bankruptcy court order denying defendant a trial by jury on the allegations of common law fraud.

Additionally the court of appeals held that defendant Hashemi breached his credit card contract with American Express by non payment of the charges made on the credit cards and that this issue is one normally requiring a trial by jury quoting *Atlas Roofing Co. v Occupational Safety Comm'n* 430 U.S. 442, 97 S.Ct. 1261, 51 L.Ed.2d 464 (1977). However, the court of appeals held that never the less defendant Hashemi is not entitled to a jury trial on this

issue pursuant to the authority of *In Re: Conejo Enterprises, Inc* 96 F.3d 346 (9th Cir. 1996). In this case the court held that a bankruptcy litigant waives his or her right to a jury trial in proceedings "vital to the bankruptcy process of allowance and disallowance of claims."

In summary it would be consistent with The Constitution and with all prior decisions of this court for the court to now decide that a debtor in bankruptcy is indeed entitled to the right to a trial by jury pursuant to the Seventh Amendment, but this decision would conflict with numerous cases in the bankruptcy court system and numerous cases of circuit courts of appeal.

The Issue Of Presumed Not Actual Fraud

THE INTENTION OF CONGRESS

Section 523(a)(2)(A) of the Bankruptcy Code states:

> (a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt---
> (2) for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by-
> (A) false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's or an indsider's financial condition.....

In the authoritative publication *Collier On Bankruptcy* 15th edition revised at ¶ 523.08[1][e] Matthew Bender & Co, Inc, (December 1996) it is stated as follows:

> Section 523(a)(2) covers "actual fraud" as well as false pretenses and representations.

> Actual fraud, by definition consists of any deceit, artifice, trick or design involving direct and active operation of the mind, used to circumvent and cheat another---something said, done, or omitted with the design of perpetrating what is known to be a cheat or deception. The concealment of material facts by a fiduciary may also be fraud. (Citation) Section 512(a)(2)(A) was intended to codify case law as expressed in *Neal v Clark* 95 U.S. 704, 24 L.Ed. 586 (1878) which interpreted "fraud" to mean actual or positive fraud rather than fraud implied by law. (Citation to Congressional Record)
>
> To sustain a prima facie case of fraud, a plaintiff under section 512(a)(2)(A) must establish that: (1) the debtor made a representation; (2) at the time of the representation the debtor knew it to be false; (3) the debtor made the representation with the intent and purpose of deceiving the plaintiff; (4) the plaintiff reasonably relied on the representation and the reliance was reasonably founded; and (5) the plaintiff sustained a loss or damage as the proximate consequence of the representation having been made. (Citations)

DECISIONS OF THIS COURT

In *Grogan v Garner* 498 U.S. 412, 112 L.Ed.2d 755, 111 S.Ct. 654 (1991) this court held that to prove fraud there must be evidence of each element of the fraud proven by a preponderance of the evidence. It would appear that this by implication rules out presumption of fraud without evidence.

In *Williams v United States* 458 U.S. 279,

102 S.Ct. 3088, 73 L.Ed.2d 767 (1982) this court held that false pretenses or false representations involve proof of at least false representations which is consistent with the intention of Congress and other cases of this court on the issue of proof of the elements of actual fraud. In this case this court also held that passing a check is not a representation of any kind and does not imply fraud if the check does not clear the bank. This is identical to making a charge on a credit card and some credit cards even permit the writing of a check on the credit card account.

In *Neal v Scruggs* 95 U.S. 704, 24 L.Ed. 586 (1878) this court held:

> Applying these rules to this case we remark that, in the section of the Law of 1867 which sets forth the classes of debts which are exempted from the operation of a discharge in bankruptcy, debts created by "fraud" are associated directly with debts created by "embezzlement." Such association justifies, if it does not imperatively require, the conclusion that the "fraud" referred to in that section means positive fraud, or fraud in fact, involving moral turpitude or intentional wrong, as does embezzlement; and not implied fraud, or fraud in law, which may exist without the imputation of bad faith or immorality.

Clearly Congress has looked to this court for guidance on the issue of fraud and going back to the days of Mr Justice Harlan in 1878 Congress has declared that actual fraud must be proven in order for a creditor to exempt any debt from discharge. Presumably this also applies to credit card creditors. Hopefully if the prayed for writ is granted then this court will also look to its own prior decision on the issue of fraud for purposes of non

dischargeability in bankruptcy and will bring us up to date on this issue.

TRIAL COURT AUTHORITIES IN CONFLICT WITH THE INTENTION OF CONGRESS AND DECISIONS OF THIS COURT

In The Bankruptcy Court For The Central District Of California, and other bankruptcy courts of the Ninth Circuit the leading case on the issue of credit card fraud is the case *In Re: Dougherty* 84 B.R. 653 (9th Cir. B.A.P. 1988).

In this case the court analyzed a case for nondischargeability in bankruptcy for a credit card creditor and made the following decisions:

> That in third party credit card transactions fraud can be proven without the creditor having to prove the elements of representation and reliance since these concepts have little meaning in this kind of transaction.
>
> That fraud is proven by the creditor producing evidence that the defendant debtor made charges without any intent of paying for the same. In determining what was the debtor's intent the court may use the following list of non-exclusive factors:
>
> 1. The length of time between the charges made and the filing of bankruptcy;
>
> 2. Whether or not an attorney has been consulted concerning the filing of bankruptcy before the charges were made;

3. The number of charges made;

4. the amount of the charges;

5. The financial condition of the debtor at the time the charges were made;

6. Whether the charges were above the credit limit of the account;

7. Whether the debtor made multiple charges on the same day;

8. Whether or not the debtor was employed;

9. The debtor's prospects for employment;

10. Financial sophistication of the debtor;

11. Whether there was a sudden change in the debtor's buying habits; and

12. Whether the purchases were made of luxuries or necessities.

All other known cases hold that to establish a claim for nondischargeability based on fraud the creditor must prove actual fraud, and all of its elements which are: 1) Representation of fact by the debtor; 2) that it is material; 3) that the debtor knew at the time that it was false; 4) that the debtor made the representation with the intention of deceiving the creditor; 5) reliance by the creditor; 6) reasonable reliance; and 7) damage proximately caused by the misrepresentation. *In Re: Pascucci* 90 B.R. 438 (Bkcy. C.D.Cal. 1988) *In Re: Kirsh* 973 F.2d 1454 (9th Cir. 1992); *In Re: Britton* 950 F.2d 602 (9th Cir. 1991); *In Re: Schuer* 125 B.R. 584 (Bkcy. C.D.Cal.); *In Re: Quick* 70 B.R.

562 (Bkcy S.D.CA., 1972.

It is submitted that the case *In Re: Dougherty, supra*, does not follow any of these cases that establish the law for the basis of a judgment of dischargeability based on fraud because it only requires that a credit card creditor prove one or more of the so called Dougherty factors to establish fraud as a basis for nondischargeability in bankruptcy of the debt. For example in the present case the bankruptcy court found that American Express proved several of the so called Dougherty factors and used this as a basis for a judgment of nondischargeability based on fraud in spite of the fact that American Express did not prove or even attempt to prove any of the actual elements of actual fraud in the bankruptcy court. Clearly the case *In Re: Dougherty* if followed by a trial court will mean that all debtors in bankruptcy will not be able to discharge credit card debts because all debtors will be found to have indulged in at least one, possibly more, so called Dougherty factors.

For example if a credit card creditor proves that a debtor purchased some luxury items on a credit card then filed for bankruptcy protection it does not logically follow that because the person purchased one or more luxury items the person defrauded the credit card creditor. Yet this is the basis for the judgment of non-dischargeability based on fraud in this present case according to the findings of fact and conclusions of law of the bankruptcy court that tried the matter.

In a nutshell the bankruptcy trial court found that American Express proved one or more so called Dougherty Factors which established a case of credit card fraud by presumption, not by actual evidence. The only actual evidence of fraud produced by American Express at the trial of the matter is the statement that the only

evidence to prove actual fraud available by American Express is that defendant Hashemi did not pay his credit card charges as agreed and breached his contract with American Express.

Clearly this interpretation of the Bankruptcy Code by the bankruptcy court is improper, is in conflict with the clearly expressed intention of Congress, and is in conflict with the decisions of this court going back to the days of Mr Justice Harlan in 1878.

AUTHORITIES USED BY THE COURT OF APPEALS

In affirming the bankruptcy trial court judgment the court of appeals cited *In Re Dougherty*, 84 B.R. 653 (9th Cir. B.A.P. 1988) and *In Re: Eashai* 87 F.3d 1082 (9th Cir. 1996) and inferred that defendant Hashemi intended to defraud American Express by using his unrestricted credit card. This is in direct conflict with the intention of Congress and the decisions on the matter of this court.

Also the court of appeals cited *In Re: Anastas* 94 F.3d 1280 (9th Cir. 1996) for the proposition that each time a credit card holder used the card he or she implies that he or she intends to repay the debt. This conflicts with the intention of Congress and all cases on the issue of presumed fraud that have been decided by this court. The court of appeals also relied on this case for authority that a credit card issuer justifiably relies on the implied representations of intent to repay as long as the account is not is default. Again this presumes justifiable reliance without any factual basis for the presumption.

In a nutshell this issue revolves around whether it is proper to presume fraud or whether it is proper to prove all of the elements of actual fraud by a preponderance of the evidence as has been held to be proper by this court.

Finally there are cases that hold that false pretenses is not actual fraud but is presumed fraud or fraud implied in law or equity. One case for this proposition is *Matter Of G. Reitz* 134 B.R. 131 (Bankr. D.Del. 1991) wherein the court held:

> False pretenses such as may preclude discharge of debt in bankruptcy involved implied misrepresentation or conduct which relates and fosters a false impression.

Again this interpretation of the words false pretenses conflicts with the clearly expressed intention of Congress and all prior decisions of this court.

Does Presumed Fraud Deny One Of Due Process

This court in *Mathews v Eldridge* 424 U.S. 313, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976) held that the fundamental requirement of due process is the opportunity to be heard at a meaningful time in a meaningful manner.

This raises two issues not known to have been decided by this court to date: 1) Does presumption of fraud result in denial of due process; and 2) Does classification of a matter of law as a matter of equity result in denial of not only the right to trial by jury but in denial of due process itself.

Attorney Fees

According to the decision of the court of appeals the prevailing party on a dispute based on breach of contract is entitled to an award of attonrey's fees according to California law. If this court finds that the present case is nothing more than a breach of contract case from which fraud is presumed then according to California law it would be proper for this court to award attorney's fees to long suffering, hard

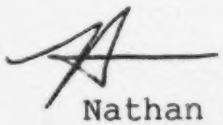
working, attorney for defendant Hashemi.

Conclusion

Premises considered, petitioner prays that this court of last resort will grant the petition for certiorari for all of the reasons set forth herein.

Respectfully submitted.

DATED: March 17, 1997



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Appendix

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

In re: HASSAN HAMIDI HASHEMI,
Debtor.

AMERICAN EXPRESS TRAVEL RELATED SERVICES COMPANY INC.,
Plaintiff-Appellee,

v.

HASSAN HAMIDI HASHEMI,
Defendant-Appellant.

No. 95-55628
D.C. No.
CV-94-07668-ER
OPINION

Appeal from the United States District Court
for the Central District of California
Edward Rafeedie, District Judge, Presiding

Argued and Submitted
September 20, 1996—Pasadena, California

Filed: December 30, 1996

Before: Alex Kozinski and Edward Leavy, Circuit Judges,
and William W Schwarzer,* District Judge.

Opinion by Judge Kozinski

---

*Honorable William W Schwarzer, Senior United States District Judge for the Northern District of California, sitting by designation.

SUMMARY

Bankruptcy/Dischargeability of Debts

The court of appeals affirmed the judgment of a district court and remanded. The court held that bankruptcy litigants have no Seventh Amendment right to a jury trial in dischargeability proceedings.

Appellant Hassan Hashemi owed appellee American Express Travel Related Services Company, Inc. more than $60,000. The bulk of these charges were made during a six-week trip to Europe. Hashemi filed for bankruptcy and American Express petitioned to have his debts declared nondischargeable because they were incurred through fraud. Hashemi argued that American Express failed to establish his intent to defraud, that he made no false representations to American Express, and that even if false representations were made, American Express did not justifiably rely on them. The bankruptcy court denied Hashemi's request for a jury trial, ruled the debt nondischargeable, and ordered Hashemi to pay American Express the debts plus interest.

[1] A two-part test is used to determine whether the Seventh Amendment right to a jury trial applies to a given proceeding. The second prong of the two-part test examines whether the remedy sought is legal or equitable in nature. Dischargeability proceedings fail the test's second prong because such proceedings are equitable in nature. Bankruptcy litigants have no Seventh Amendment right to a jury trial in dischargeability proceedings.

[2] Although the bankruptcy court's finding that Hashemi had breached his credit agreement with American Express was legal, not equitable, a bankruptcy litigant waives his right to a jury trial in proceedings vital to the bankruptcy process of allowance and disallowance of claims. The bankruptcy

court properly granted summary judgment to American Express on its breach-of-contract claim. No trial was required.

[3] The discharge of any debt obtained by false pretenses, a false representation, or actual fraud is precluded. [4] A court may infer the existence of the debtor's intent not to pay if the facts and circumstances present a picture of the debtor's deceptive conduct. [5] Evidence of Hashemi's trip expenditures and financial situation supported the finding that Hashemi intended to defraud American Express.

[6] When a credit card holder uses the card without an intent to pay, he has made a fraudulent representation to the card issuer. Because the bankruptcy court found that Hashemi had no intention of repaying his debt, each time he used his card he made a fraudulent representation to American Express.

[7] The credit card issuer justifiably relies on a representation of intent to repay as long as the account is not in default and any initial investigations into a credit report do not raise red flags that would make reliance unjustifiable. Because American Express provided ample evidence of each element of common law fraud, the bankruptcy court's declaration of appellant's debt as nondischargeable was fully justified.

[8] A provision in Hashemi's card member agreement that allowed American Express to recover attorney's fees incurred in enforcing its rights under the contract was broad enough to cover nondischargeability proceedings. American Express was entitled to a fee award.

COUNSEL

Nathan Boatner, Los Angeles, California, for the defendant-appellant.

Gilbert B. Weisman, Becket & Watkins, Malvern, Pennsylvania; Dennis Winters, Winters Law Firm, Santa Ana, California, for the plaintiff-appellee.

OPINION

KOZINSKI, Circuit Judge.

Appellant didn't leave home without his American Express cards. In fact, he and his family traveled to Europe in style, and charged it all. On his return, appellant owed American Express more than $60,000, the bulk of which represented charges made during the six-week trip. He promptly filed for bankruptcy, and American Express petitioned to have his debt declared nondischargeable under 11 U.S.C. § 523(a)(2)(A), which precludes discharge of debts obtained through "actual fraud." The bankruptcy court denied appellant's request for a jury trial, ruled the debt nondischargeable and ordered appellant to pay American Express $69,793.67 plus interest. The district court affirmed the bankruptcy court's judgment and Dr. Hashemi appeals again. We must decide whether appellant was entitled to a jury trial in the dischargeability proceeding, whether American Express adduced sufficient proof of "actual fraud" and whether American Express, as a prevailing party, is entitled to attorney's fees.

I

[1] Appellant first argues that the Seventh Amendment guarantees him the right to have a jury decide whether his debt is dischargeable. We determine whether the Seventh Amendment applies to a given proceeding by reference to the two-part test of *Granfinanciera, S. A.* v. *Nordberg,* 492 U.S. 33 (1989): "First, we compare the statutory action to 18th-century actions brought in the courts of England prior to the merger of the courts of law and equity. Second, we examine

the remedy sought and determine whether it is legal or equitable in nature." *Id.* at 42 (quoting *Tull* v. *United States*, 481 U.S. 412, 417-18 (1987)). Actions to determine the nondischargeability of debts fail the second prong of this test because such proceedings are equitable in nature. *See N.I.S. Corp.* v. *Hallahan (In re Hallahan)*, 936 F.2d 1496, 1505-06 (7th Cir. 1991); *Schieber* v. *Hooper (In re Hooper)*, 112 B.R. 1009, 1011-13 (Bankr. 9th Cir. 1990). Bankruptcy litigants therefore have no Seventh Amendment right to a jury trial in dischargeability proceedings.

[2] In the course of making the dischargeability determination, however, the bankruptcy court also found that appellant had breached his credit agreement with American Express; it ordered him to repay the nondischarged debt with interest. This determination was legal, not equitable, *see Atlas Roofing Co.* v. *Occupational Safety Comm'n*, 430 U.S. 442, 459 (1977), and therefore fell within the ambit of the Seventh Amendment. Nevertheless, we have held that a bankruptcy litigant waives his right to a jury trial in proceedings "vital to the bankruptcy process of allowance and disallowance of . . . claims." *Benedor Corp.* v. *Conejo Enterprises, Inc. (In re Conejo Enterprises, Inc.)*, 96 F.3d 346, 354 n.6 (9th Cir. 1996). We need not decide here whether an action to recover a nondischargeable debt falls into this category.[1] Appellant conceded that he breached his contract with American

[1]The debtor-creditor relationship is clearly restructured by a dischargeability proceeding, which determines the post-petition collectability of a debt even where the debtor denies owing it. It is not clear, however, how the *Benedor* test would apply to a creditor's breach of contract claim, which only seeks to define, rather than restructure, the parameters of the parties' pre-petition relationship. On the one hand, the outcome of this action will affect other creditors of the bankruptcy estate by drawing money from the pool of assets available to satisfy the debtor's obligations. Determinations of liability may therefore affect the restructuring of the debtor's relationship with other creditors. On the other hand, it is not clear that this effect is significant enough to make such proceedings "vital" under *Benedor*.

Express and that he made or authorized all of the charges in question. Because there were no contested issues of fact, the bankruptcy court properly granted summary judgment to American Express on its breach of contract claim. No trial, by judge or by jury, was required.

II

[3] Having failed in his effort to obtain a new trier of fact, appellant claims the bankruptcy court erred in finding that he defrauded American Express. Section 523(a)(2)(A) precludes discharge of any debt obtained by "false pretenses, a false representation, or actual fraud." In order to establish a debt's nondischargeability under this section, the creditor must show:

> (1) the debtor made . . . representations;
> (2) that at the time he knew they were false;
> (3) that he made them with the intention and purpose of deceiving the creditor;
> (4) that the creditor relied on such representations; [and]
> (5) that the creditor sustained the alleged loss and damage as the proximate result of the misrepresentations having been made.

Britton v. *Price (In re Britton)*, 950 F.2d 602, 604 (9th Cir. 1991). These requirements mirror the elements of common law fraud, *see Citibank* v. *Eashai (In re Eashai)*, 87 F.3d 1082, 1087 (9th Cir. 1996), and the creditor is required to prove each by a preponderance of the evidence. *See Grogan* v. *Garner*, 498 U.S. 279, 291 (1991). Appellant contends that American Express failed to establish his intent to defraud, that he made no false representations to American Express, and that if any such representations were made, American Express did not justifiably rely on them.

[4] a. *Fraudulent Intent.* "[A] court may infer the existence of the debtor's intent not to pay if the facts and circumstances of a particular case present a picture of deceptive conduct by the debtor." *In re Eashai*, 87 F.3d at 1087. In *Citibank South Dakota* v. *Dougherty (In re Dougherty)*, 84 B.R. 653 (Bankr. 9th Cir. 1988), our Bankruptcy Appellate Panel enumerated twelve factors relevant to determining a debtor's intent.[2] These factors are nonexclusive; none is dispositive, nor must a debtor's conduct satisfy a minimum number in order to prove fraudulent intent. So long as, on balance, the evidence supports a finding of fraudulent intent, the creditor has satisfied this element. *See Grogan*, 498 U.S. at 291. We adopted *Dougherty*'s twelve-factor test as the law of the circuit in *In re Eashai*, 87 F.3d at 1087-88.

[5] Applying the test set out in *Dougherty* and *Eashai*, as did the bankruptcy court, there is ample evidence to support the finding that appellant intended to defraud American Express. Appellant made nearly 170 charges totaling more than $60,000 during a six-week trip with his family to France. These charges exceeded appellant's annual income and, even before the trip, appellant already owed more than $300,000 in unsecured credit card debt. Appellant did have one major asset when he made the charges—a one-half ownership interest in an eight-unit condominium project. He claims the purpose of his trip was to borrow money from his mother-in-law to support this real estate venture. This does not explain why

[2]The factors are: (1) the length of time between the charges and the bankruptcy filing; (2) whether or not an attorney had been consulted concerning the filing of bankruptcy before the charges were made; (3) the number of charges made; (4) the amount of the charges; (5) the financial condition of the debtor at the time the charges were made; (6) whether the charges were above the credit limit of the account; (7) whether the debtor made multiple charges on the same day; (8) whether or not the debtor was employed; (9) the debtor's prospects for employment; (10) the financial sophistication of the debtor; (11) whether there was a sudden change in the debtor's buying habits; and (12) whether the purchases made were luxuries or necessities. *See In re Dougherty*, 84 B.R. at 657.

appellant stayed in France for six weeks, took his wife and two children with him, took a side-trip to the French Riviera, purchased cosmetics, expensive meals and other luxury items, and ultimately charged almost as much on his credit cards as he claims he planned to borrow. Moreover, while appellant was away, the holder of the second mortgage on his condominium project initiated foreclosure proceedings.[3] This should have alerted appellant that he would not be able to repay his debt by selling his interest in the property. Given these facts, the bankruptcy court could reasonably infer that appellant tried to have a last hurrah at American Express's expense.

[6] b. *False Representations.* Appellant also complains that he never made any fraudulent misrepresentations to American Express because American Express extended him an unlimited line of credit. We rejected the identical argument in *Anastas* v. *American Savings Bank (In re Anastas)*, 94 F.3d 1280 (9th Cir. 1996). Each time a "card holder uses his credit card, he makes a representation that he intends to repay the debt. . . . When the card holder uses the card without an intent to repay, he has made a fraudulent representation to the card issuer." *Id.* at 1285. Because the bankruptcy court found that appellant had no intention of repaying his debt, each time he used his cards he made a fraudulent representation to American Express.

[7] c. *Justifiable Reliance.* "[T]he credit card issuer justifiably relies on a representation of intent to repay as long as the account is not in default and any initial investigations into a credit report do not raise red flags that would make reliance unjustifiable." *Id.* at 1286. At the time appellant began his spending spree, his account was not in default. In fact, he owed American Express only $227. Moreover, appellant himself testified that he had repaid American Express balances of up to $60,000 "numerous times" before. American Express

[3]Appellant's mother-in-law appears not to have been moved by his plight, as he was unable to forestall the foreclosure.

therefore had no reason to question the good faith of appellant's promise to repay. Because American Express provided ample evidence of each element of common law fraud, the bankruptcy court was fully justified in declaring appellant's debt nondischargeable.

III

[8] Having successfully avoided discharge of appellant's debt, American Express seeks an award of attorney's fees. Its request is based on a clause in appellant's cardmember agreement that allows American Express to recover attorney's fees incurred in enforcing its rights under the contract. Because this provision is broad enough to cover nondischargeability proceedings, American Express is entitled to a fee award.

At issue in the dischargeability proceeding was whether the contract, as written, would remain an enforceable obligation against appellant. The costs of litigating this question fall within the letter of the cardmember agreement's fee provision, and are therefore part of appellant's contractual debt to American Express. *See TranSouth Financial Corp.* v. *Johnson*, 931 F.2d 1505, 1506-09 (11th Cir. 1991); *Martin* v. *Bank of Germantown (In re Martin)*, 761 F.2d 1163, 1167-68 (6th Cir. 1985). This debt is nondischargeable along with the rest of appellant's fraudulently incurred charges, *see Jordan* v. *Southeast Nat'l Bank (In re Jordan)*, 927 F.2d 221, 226-28 (5th Cir. 1991), *overruled on other grounds*, *Coston* v. *Bank of Malvern (In re Coston)*, 991 F.2d 257 (5th Cir. 1993), because the losses suffered by American Express include attorney's fees spent prosecuting the dischargeability action. *See Mayer* v. *Spanel Int'l. Ltd.*, 51 F.3d 670, 677 (7th Cir.), *cert. denied*, 116 S. Ct. 563 (1995). This sort of "[f]raudulent conduct is best discouraged, not only by denying discharge, but also by applying the benefit-of-the-bargain rule. That is, the creditor who has been defrauded is entitled to all of its rights under the contract, including reasonable attorney fees." *Chase Manhattan Bank* v. *Birkland*, 98 B.R. 35, 37 (W.D.

Wash. 1988). The case is therefore remanded to the district court for determination of a reasonable fee award.

AFFIRMED AND REMANDED.

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

In re: HASSAN HAMIDI HASHEMI,
Debtor.

AMERICAN EXPRESS TRAVEL RELATED SERVICES COMPANY INC.,
Plaintiff-Appellee,

v.

HASSAN HAMIDI HASHEMI,
Defendant-Appellant.

No. 95-55628

D.C. No. CV-94-07668-ER

ORDER AND AMENDED OPINION

Appeal from the United States District Court
for the Central District of California
Edward Rafeedie, District Judge, Presiding

Argued and Submitted
September 20, 1996—Pasadena, California

Filed December 30, 1996
Amended January 24, 1997

Before: Alex Kozinski and Edward Leavy, Circuit Judges, and William W Schwarzer,* District Judge.

Opinion by Judge Kozinski

*Honorable William W Schwarzer, Senior United States District Judge for the Northern District of California, sitting by designation.

SUMMARY

Bankruptcy/Dischargeability of Debts

The court of appeals affirmed the judgment of a district court and remanded. The court held that bankruptcy litigants have no Seventh Amendment right to a jury trial in dischargeability proceedings.

Appellant Hassan Hashemi owed appellee American Express Travel Related Services Company, Inc. more than $60,000. The bulk of these charges were made during a six-week trip to Europe. Hashemi filed for bankruptcy and American Express petitioned to have his debts declared nondischargeable because they were incurred through fraud. Hashemi argued that American Express failed to establish his intent to defraud, that he made no false representations to American Express, and that even if false representations were made, American Express did not justifiably rely on them. The bankruptcy court denied Hashemi's request for a jury trial, ruled the debt nondischargeable, and ordered Hashemi to pay American Express the debts plus interest.

[1] A two-part test is used to determine whether the Seventh Amendment right to a jury trial applies to a given proceeding. The second prong of the two-part test examines whether the remedy sought is legal or equitable in nature. Dischargeability proceedings fail the test's second prong because such proceedings are equitable in nature. Bankruptcy litigants have no Seventh Amendment right to a jury trial in dischargeability proceedings.

[2] Although the bankruptcy court's finding that Hashemi had breached his credit agreement with American Express was legal, not equitable, a bankruptcy litigant waives his right to a jury trial in proceedings vital to the bankruptcy process of allowance and disallowance of claims. The bankruptcy

court properly granted summary judgment to American Express on its breach-of-contract claim. No trial was required.

[3] The discharge of any debt obtained by false pretenses, a false representation, or actual fraud is precluded. [4] A court may infer the existence of the debtor's intent not to pay if the facts and circumstances present a picture of the debtor's deceptive conduct. [5] Evidence of Hashemi's trip expenditures and financial situation supported the finding that Hashemi intended to defraud American Express.

[6] When a credit card holder uses the card without an intent to pay, he has made a fraudulent representation to the card issuer. Because the bankruptcy court found that Hashemi had no intention of repaying his debt, each time he used his card he made a fraudulent representation to American Express.

[7] The credit card issuer justifiably relies on a representation of intent to repay as long as the account is not in default and any initial investigations into a credit report do not raise red flags that would make reliance unjustifiable. Because American Express provided ample evidence of each element of common law fraud, the bankruptcy court's declaration of appellant's debt as nondischargeable was fully justified.

[8] A provision in Hashemi's card member agreement that allowed American Express to recover attorney's fees incurred in enforcing its rights under the contract was broad enough to cover nondischargeability proceedings. American Express was entitled to a fee award.

COUNSEL

Nathan Boatner, Los Angeles, California, for the defendant-appellant.

Gilbert B. Weisman, Becket & Watkins, Malvern, Pennsylvania; Dennis Winters, Winters Law Firm, Santa Ana, California, for the plaintiff-appellee.

ORDER

The opinion filed December 30, 1996 is amended as follows: Delete the text of Part III, beginning on slip opinion page 16463, line 7, and ending on page 16464, line 2, and replace with the following:

> Having successfully avoided discharge of appellant's debt, American Express seeks an award of attorney's fees. Its request is based on a clause in appellant's cardmember agreement that allows American Express to recover attorney's fees incurred in enforcing its rights under the contract. However, "the question of the applicability of the bankruptcy laws to particular contracts is not a question of the enforceability of a contract but rather involves a unique, separate area of federal law." *Collingwood Grain, Inc.* v. *Coast Trading Co. (In re Coast Trading Co.)*, 744 F.2d 686, 693 (9th Cir. 1984). Because the bankruptcy court did not need to "determine the enforceability of the . . . agreement to determine dischargeability," *Ford* v. *Baroff (In re Baroff)*, No. 95-17269, slip op. 251, 259 (9th Cir. Jan. 13, 1997), American Express' dischargeability claim is not an action on the contract. American Express is therefore not entitled to fees incurred pursuing this part of its claim. *See Grove* v. *Fulwiler (In re Fulwiler)*, 624 F.2d 908, 910 (9th Cir. 1980).
>
> In addition to declaring appellant's debt nondischargeable, the bankruptcy court also found he had breached his credit agreement with American

Express. The costs of litigating this issue—however small they might be because the breach was not disputed—do fall within the letter of the cardmember agreement's fee provision. American Express is thus entitled by state law to recover any fees incurred litigating this question. *See Krommenhoek* v. *A-Mark Precious Metals, Inc. (In re Bybee)*, 945 F.2d 309, 315-16 (9th Cir. 1991) (prevailing party can recover fees for some claims litigated in bankruptcy court even if fees are unavailable for others); *Merced Production Credit Assn.* v. *Sparkman (In re Sparkman)*, 703 F.2d 1097, 1099-1110 (9th Cir. 1983) (attorney's fees may be recovered where "bankruptcy court adjudicates a contract claim in connection with a petition in bankruptcy"). Whether American Express incurred any segregable fees prosecuting its breach of contract claim, and the amount of any such fees, we leave for determination on remand.

OPINION

KOZINSKI, Circuit Judge.

Appellant didn't leave home without his American Express cards. In fact, he and his family traveled to Europe in style, and charged it all. On his return, appellant owed American Express more than $60,000, the bulk of which represented charges made during the six-week trip. He promptly filed for bankruptcy, and American Express petitioned to have his debt declared nondischargeable under 11 U.S.C. § 523(a)(2)(A), which precludes discharge of debts obtained through "actual fraud." The bankruptcy court denied appellant's request for a jury trial, ruled the debt nondischargeable and ordered appellant to pay American Express $69,793.67 plus interest. The district court affirmed the bankruptcy court's judgment and Dr. Hashemi appeals again. We must decide whether appel-

lant was entitled to a jury trial in the dischargeability proceeding, whether American Express adduced sufficient proof of "actual fraud" and whether American Express, as a prevailing party, is entitled to attorney's fees.

I

[1] Appellant first argues that the Seventh Amendment guarantees him the right to have a jury decide whether his debt is dischargeable. We determine whether the Seventh Amendment applies to a given proceeding by reference to the two-part test of *Granfinanciera, S. A.* v. *Nordberg*, 492 U.S. 33 (1989): "First, we compare the statutory action to 18th-century actions brought in the courts of England prior to the merger of the courts of law and equity. Second, we examine the remedy sought and determine whether it is legal or equitable in nature." *Id.* at 42 (quoting *Tull* v. *United States*, 481 U.S. 412, 417-18 (1987)). Actions to determine the nondischargeability of debts fail the second prong of this test because such proceedings are equitable in nature. *See N.I.S. Corp.* v. *Hallahan (In re Hallahan)*, 936 F.2d 1496, 1505-06 (7th Cir. 1991); *Schieber* v. *Hooper (In re Hooper)*, 112 B.R. 1009, 1011-13 (Bankr. 9th Cir. 1990). Bankruptcy litigants therefore have no Seventh Amendment right to a jury trial in dischargeability proceedings.

[2] In the course of making the dischargeability determination, however, the bankruptcy court also found that appellant had breached his credit agreement with American Express; it ordered him to repay the nondischarged debt with interest. This determination was legal, not equitable, *see Atlas Roofing Co.* v. *Occupational Safety Comm'n*, 430 U.S. 442, 459 (1977), and therefore fell within the ambit of the Seventh Amendment. Nevertheless, we have held that a bankruptcy litigant waives his right to a jury trial in proceedings "vital to the bankruptcy process of allowance and disallowance of . . . claims." *Benedor Corp.* v. *Conejo Enterprises, Inc. (In re Conejo Enterprises, Inc.)*, 96 F.3d 346, 354 n.6 (9th Cir.

1996). We need not decide here whether an action to recover a nondischargeable debt falls into this category.[1] Appellant conceded that he breached his contract with American Express and that he made or authorized all of the charges in question. Because there were no contested issues of fact, the bankruptcy court properly granted summary judgment to American Express on its breach of contract claim. No trial, by judge or by jury, was required.

II

[3] Having failed in his effort to obtain a new trier of fact, appellant claims the bankruptcy court erred in finding that he defrauded American Express. Section 523(a)(2)(A) precludes discharge of any debt obtained by "false pretenses, a false representation, or actual fraud." In order to establish a debt's nondischargeability under this section, the creditor must show:

> (1) the debtor made . . . representations;
> (2) that at the time he knew they were false;
> (3) that he made them with the intention and purpose of deceiving the creditor;
> (4) that the creditor relied on such representations; [and]
> (5) that the creditor sustained the alleged loss and

[1]The debtor-creditor relationship is clearly restructured by a dischargeability proceeding, which determines the post-petition collectability of a debt even where the debtor denies owing it. It is not clear, however, how the *Benedor* test would apply to a creditor's breach of contract claim, which only seeks to define, rather than restructure, the parameters of the parties' pre-petition relationship. On the one hand, the outcome of this action will affect other creditors of the bankruptcy estate by drawing money from the pool of assets available to satisfy the debtor's obligations. Determinations of liability may therefore affect the restructuring of the debtor's relationship with other creditors. On the other hand, it is not clear that this effect is significant enough to make such proceedings "vital" under *Benedor*.

damage as the proximate result of the misrepresentations having been made.

Britton v. *Price (In re Britton)*, 950 F.2d 602, 604 (9th Cir. 1991). These requirements mirror the elements of common law fraud, *see Citibank* v. *Eashai (In re Eashai)*, 87 F.3d 1082, 1087 (9th Cir. 1996), and the creditor is required to prove each by a preponderance of the evidence. *See Grogan* v. *Garner*, 498 U.S. 279, 291 (1991). Appellant contends that American Express failed to establish his intent to defraud, that he made no false representations to American Express, and that if any such representations were made, American Express did not justifiably rely on them.

[4] a. *Fraudulent Intent.* "[A] court may infer the existence of the debtor's intent not to pay if the facts and circumstances of a particular case present a picture of deceptive conduct by the debtor." *In re Eashai*, 87 F.3d at 1087. In *Citibank South Dakota* v. *Dougherty (In re Dougherty)*, 84 B.R. 653 (Bankr. 9th Cir. 1988), our Bankruptcy Appellate Panel enumerated twelve factors relevant to determining a debtor's intent.[2] These factors are nonexclusive; none is dispositive, nor must a debtor's conduct satisfy a minimum number in order to prove fraudulent intent. So long as, on balance, the evidence supports a finding of fraudulent intent, the creditor has satisfied this element. *See Grogan*, 498 U.S. at 291. We adopted *Dougherty*'s twelve-factor test as the law of the circuit in *In re Eashai*, 87 F.3d at 1087-88.

[2]The factors are: (1) the length of time between the charges and the bankruptcy filing; (2) whether or not an attorney had been consulted concerning the filing of bankruptcy before the charges were made; (3) the number of charges made; (4) the amount of the charges; (5) the financial condition of the debtor at the time the charges were made; (6) whether the charges were above the credit limit of the account; (7) whether the debtor made multiple charges on the same day; (8) whether or not the debtor was employed; (9) the debtor's prospects for employment; (10) the financial sophistication of the debtor; (11) whether there was a sudden change in the debtor's buying habits; and (12) whether the purchases made were luxuries or necessities. *See In re Dougherty*, 84 B.R. at 657.

[5] Applying the test set out in *Dougherty* and *Eashai*, as did the bankruptcy court, there is ample evidence to support the finding that appellant intended to defraud American Express. Appellant made nearly 170 charges totaling more than $60,000 during a six-week trip with his family to France. These charges exceeded appellant's annual income and, even before the trip, appellant already owed more than $300,000 in unsecured credit card debt. Appellant did have one major asset when he made the charges—a one-half ownership interest in an eight-unit condominium project. He claims the purpose of his trip was to borrow money from his mother-in-law to support this real estate venture. This does not explain why appellant stayed in France for six weeks, took his wife and two children with him, took a side-trip to the French Riviera, purchased cosmetics, expensive meals and other luxury items, and ultimately charged almost as much on his credit cards as he claims he planned to borrow. Moreover, while appellant was away, the holder of the second mortgage on his condominium project initiated foreclosure proceedings.[3] This should have alerted appellant that he would not be able to repay his debt by selling his interest in the property. Given these facts, the bankruptcy court could reasonably infer that appellant tried to have a last hurrah at American Express's expense.

[6] b. *False Representations.* Appellant also complains that he never made any fraudulent misrepresentations to American Express because American Express extended him an unlimited line of credit. We rejected the identical argument in *Anastas* v. *American Savings Bank (In re Anastas)*, 94 F.3d 1280 (9th Cir. 1996). Each time a "card holder uses his credit card, he makes a representation that he intends to repay the debt. . . . When the card holder uses the card without an intent to repay, he has made a fraudulent representation to the card issuer." *Id.* at 1285. Because the bankruptcy court found that appellant had no intention of repaying his debt, each time he

[3]Appellant's mother-in-law appears not to have been moved by his plight, as he was unable to forestall the foreclosure.

used his cards he made a fraudulent representation to American Express.

[7] c. *Justifiable Reliance.* "[T]he credit card issuer justifiably relies on a representation of intent to repay as long as the account is not in default and any initial investigations into a credit report do not raise red flags that would make reliance unjustifiable." *Id.* at 1286. At the time appellant began his spending spree, his account was not in default. In fact, he owed American Express only $227. Moreover, appellant himself testified that he had repaid American Express balances of up to $60,000 "numerous times" before. American Express therefore had no reason to question the good faith of appellant's promise to repay. Because American Express provided ample evidence of each element of common law fraud, the bankruptcy court was fully justified in declaring appellant's debt nondischargeable.

III

[8] Having successfully avoided discharge of appellant's debt, American Express seeks an award of attorney's fees. Its request is based on a clause in appellant's cardmember agreement that allows American Express to recover attorney's fees incurred in enforcing its rights under the contract. However, "the question of the applicability of the bankruptcy laws to particular contracts is not a question of the enforceability of a contract but rather involves a unique, separate area of federal law." *Collingwood Grain, Inc.* v. *Coast Trading Co. (In re Coast Trading Co.)*, 744 F.2d 686, 693 (9th Cir. 1984). Because the bankruptcy court did not need to "determine the enforceability of the . . . agreement to determine dischargeability," *Ford* v. *Baroff (In re Baroff)*, No. 95-17269, slip op. 251, 259 (9th Cir. Jan. 13, 1997), American Express' dischargeability claim is not an action on the contract. American Express is therefore not entitled to fees incurred pursuing this part of its claim. *See Grove* v. *Fulwiler (In re Fulwiler)*, 624 F.2d 908, 910 (9th Cir. 1980).

In addition to declaring appellant's debt nondischargeable, the bankruptcy court also found he had breached his credit agreement with American Express. The costs of litigating this issue—however small they might be because the breach was not disputed—do fall within the letter of the cardmember agreement's fee provision. American Express is thus entitled by state law to recover any fees incurred litigating this question. *See Krommenhoek* v. *A-Mark Precious Metals, Inc. (In re Bybee)*, 945 F.2d 309, 315-16 (9th Cir. 1991) (prevailing party can recover fees for some claims litigated in bankruptcy court even if fees are unavailable for others); *Merced Production Credit Assn.* v. *Sparkman (In re Sparkman)*, 703 F.2d 1097, 1099-1110 (9th Cir. 1983) (attorney's fees may be recovered where "bankruptcy court adjudicates a contract claim in connection with a petition in bankruptcy"). Whether American Express incurred any segregable fees prosecuting its breach of contract claim, and the amount of any such fees, we leave for determination on remand.

AFFIRMED AND REMANDED.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

In Re:	CV 94-7668 ER
	Adv No. AD 93-04014 AG
HASSAN HAMIDI HASHEMI	Chapter 7
	Bankr.No. LA93-360010AG
Debtor	
	FILED March 27, 1995
AMERICAN EXPRESS TRAVEL RELATED SERVICES CO.,INC	
Plaintiff-Appellee	
v.	
HASSAN HAMIDI HASHEMI	
Defendant-Appellant	

The parties came before the Honorable Edward Rafeedie on March 27, 1995, on debtor's appeal of the Bankruptcy Court's determination that his debt to plaintiff was non-dischargeable because it was fraudulently incurred.

The Court, having read and considered all of the arguments in support of and in opposition to the debtor's motion, and after hearing oral argument, AFFIRMED the decision of the Bankruptcy Court for the reasons stated in open Court.

IT IS SO ORDERED.

IT IS FURTHER ORDERED that the Clerk of the Court shall serve, by United States mail, copies of this Order on counsel for the parties in this matter.

Dated: March 27, 1995

EDWARD RAFEEDIE
United States District Judge

UNITED STATES BANKRUPTCY COURT
CENTRAL DISTRICT OF CALIFORNIA

In Re:	)	Case No. LA93-36010 AG
	)	Adv No. AD 93-04014 AG
HASSAN HAMIDI HASHEMI	)	Chapter 7
Debtor	)	
	)	
	)	FINDINGS OF FACT AND
AMERICAN EXPRESS TRAVEL RELATED SERVICES CO.,INC	)	CONCLUSIONS OF LAW DECLARING DEBT FOR $69,793.67 TO BE NONDISCHARGEABLE
Plaintiff-Appellee	)	
v.	)	ENTERED
	)	September 22, 1994
HASSAN HAMIDI HASHEMI	)	
Defendant-Appellant	)	
	)	

The debt described in the complaint is nondischargeable for the reason that it is a liability for obtaining money and property by actual fraud within 11 U.S.C. § 523(a)(2)(A). Judgment should be entered for plaintiff for $69,793.67. My reasons follow.

American Express Travel Related Services Co, Inc. (American Express) filed a complaint to recover $69,793.67 as nondischargeable in bankruptcy. The complaint arose from charges that the debtor made to three American Express cards during the summer of 1992. Most of the charges appear to have been made to finance a trip for the debtor, his wife, and his two children to France during July and August 1992. The debtor filed bankruptcy on July 22, 1993.

The Ninth Circuit Bankruptcy Appellate Panel rejected the assumption of risk and implied representation theories in favor of an

actual fraud test in credit card cases, and articulated twelve non-exclusive guidelines to determine whether the debtor possessed fraudulent intent. In Re: Dougherty, 84 BR 653, 657 (9th Cir. BAP 1988). Building on the Dougherty rule, the BAP went on to add that use of a credit card without a "reasonable prospect of ability to repay or to meet its contract terms is circumstantial evidence from which the court can infer fraudulent intent." In Re: Eashai 167 BR 181, 185 (9th Cir. BAP 1994). Where the ability to repay is dependent on success at gambling, the BAP again rejected the assumption of risk theory and required the trial judge to consider this circumstance in determining good faith and fraudulent intent. In Re: Karelin, 109 BR 943 (9th Cir. BAP 1990). Stated another way, a debtor may in a general sense eventually intent to repay, but his intent may be so qualified by unreasonable prospects as to amount to the moral equivalent of the opposite intent.

The debtor intended to defraud the plaintiff. American Express at trial satisfied most of the Dougherty tests and the Eashai test. The debtor made 173 charges totaling over $60,000 in a roughly six weeks. The amount of, the number of, and the timing of the charges were extraordinary. The defendant at the time was in serious financial trouble. At about the time he was in France, the second mortgagee on the eight plex on Glendon Avenue gave notice of default and election to sell at a non-judicial sale and within weeks of his return, the mortgage holder on his home elected to do the same. In addition, the debtor admitted that he owed over $300,000 in other unsecured debt which included much credit card and line of credit debt. As a professor at California State, his regula annual income was less than the charges made on his trip to France. The debtor was a sophisticated borrower. He held a PhD in Electrical Engineering, a real estate license, and claimed experience in property development.

Finally, an expensive European trip with his family on the eve of financial disaster was a luxury that supports fraudulent intent rather than good faith.

I do not believe the debtor's explanation that he in good faith expected to repay American Express and other creditors from the sale of his one-half ownership in the eight plex condominium building on Glendon Avenue. After returning from Europe, he never made any payments to American Express and was met by a notice of default on the Glendon Avenue property. He went into default on his home. Within a few weeks after his last charge, he transferred the Glendon Avenue property to a corporation owned by acquaintances whose sources of financing was as vague as the consideration given for the transfer. The corporation immediately filed Chapter 11. The construction lender eventually foreclosed its loan on the property. The debtor and his estate received nothing.

The debtor at the time of the charges had potential equity with his partner in the eight plex estimated to be from $400,000 to a million dollars. His equity was probably closer to the $400,000 figure depending on unit sale costs and prices, time necessary to sell, interest on debt and many other variables all of which are disputed. Nevertheless, he did not have the money to pay his debts when he and his family left for France and was insolvent in a cash flow sense and probably in a balance sheet sense.

The defendant hoped to raise money to rescue his real estate and to thereby avoid bankruptcy. He hoped that his mother-in-law, who apparently lived in France, as well as other possible investors would help him. This explains why the debtor waited to file bankruptcy and why he transferred the eight plex to delay foreclosure. He has not shown that his hope prior to making the charges amounted to a "reasonable prospect of ability to pay or to meet ... contract terms" within the Eashai test or elevate an expensive trip to Europe with his

family on the eve of a financial disaster which he had to expect into an innocent business trip. The luxury trip and his defense appear somewhat cynical.

Defendant also seems to argue that the plaintiff was at fault or assumed the risk of his financial problems when plaintiff allowed him to charge without limit on two of the cards. A variation of this argument is that there was a lack of reliance. These contentions are in the nature of blame the victim arguments and have been rejected in the Dougherty and later cases cited. I reject the arguments.

Plaintiff established all of the elements of actual fraud within 11 U.S.C. 523(a)(2)(A) and satisfied its burden under Grogan v Garner 498 U.S. 279, 286 (1991).

Once dischargeability is determined, plaintiff is free to proceed on any otherwise applicable theory to establish liability for the money or property so obtained by defendant. In addition, defendant is not entitled to a jury trial on the liability issues as a matter of law. In Re: Hallahan, supra; In Re: McLaren 3 F.3d 958 (6th Cir. 1993). The debtor did not dispute his breach of the American Express contract and there is no reasonable issue of fact regarding the amount charged.

For the foregoing reasons, judgment should be entered for the plaintiff which is nondischargeable in bankruptcy.

DATED: September 16, 1994

DONAL D. SULLIVAN
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
CENTRAL DISTRICT OF CALIFORNIA

In Re:	)	Case No. LA93-36010 AG
	)	Adv No. AD 93-04014 AG
HASSAN HAMIDI HASHEMI	)	Chapter 7
Debtor	)	
	)	
	)	JUDGMENT IN FAVOR OF
AMERICAN EXPRESS TRAVEL RELATED SERVICES CO.,INC	)	AMERICAN EXPRESS FOR $69,793.67, DECLARED TO BE NONDISCHARGEABLE IN BANKRUPTCY
Plaintiff-Appellee	)	
v.	)	ENTERED
	)	September 22, 1994
HASSAN HAMIDI HASHEMI	)	
Defendant-Appellant	)	
	)	

Based upon separate Findings Of Fact and Conclusions Of Law,

IT IS ORDERED AND ADJUDGED that the defendant Hassan Hamidi Hashemi shall pay to the plaintiff American Express Related Services Co., Inc the sum of $69,793.67 with interest as required by law.

IT IS FURTHER ORDERED that the Judgment is declared to be nondischargeable in bankruptcy pursuant to 11 U.S.C. § 523(a)(2)(A).

DATED: September 16, 1994

DONAL D. SULLIVAN
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
CENTRAL DISTRICT OF CALIFORNIA

In Re:	)	Case No. LA93-36010 AG
	)	Adv No. AD 93-04014 AG
HASSAN HAMIDI HASHEMI	)	Chapter 7
Debtor	)	
	)	ORDER
AMERICAN EXPRESS TRAVEL RELATED SERVICES CO.,INC	)	DENYING JURY TRIAL
Plaintiff-Appellee	)	
v.	)	ENTERED
	)	September 22, 1994
HASSAN HAMIDI HASHEMI	)	
Defendant-Appellant	)	

The debtor is not entitled to a jury trial in actions brought under 11 U.S.C. 523, as here. In Re: Hooper, 112 BR 1009 (9th Cir. BAP 1990); In Re: Hallahan, 936 F.2d 1496 (7th Cir. 1991).

IT IS ORDERED that defendant's request for trial by jury is denied.

DATED: September 16, 1994

DONAL D. SULLIVAN
United States Bankruptcy Judge

THE CONSTITUTION OF THE UNITED STATES

PREAMBLE

WE THE PEOPLE of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defense, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States Of America.

BILL OF RIGHTS

ARTICLE FIVE

No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

ARTICLE SEVEN

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any court of the United States, other than according to the rules of the common law.

Section 523(a)(2)(A) of the Bankruptcy Code states:

> (a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt---
> (2) for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by-
> (A) false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's or an insider's financial condition..